United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2160

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 74-2160
74-2320

UNITED STATES OF AMERICA

Appellee

vs.

ANTHONY THOMAS CAMPANILE
and
WILLIAM MONKS

Appellants

BRIEF OF APPELLANT MONKS

Appeal From The United States District Court
For the District of Vermont
Criminal No. 73-58

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FACTS

The Appellants Monks and Campanile were tried by jury on April 16-26, 1974, found guilty and convicted on two counts of stealing from a federally insured bank [18 U.S.C.2113(b)] and sentenced to eight years on each count, to run concurrently.

The Government charged that on the night of May 30-31, 1973, Monks and Campanile had stolen more than $100 from two Vermont banks, the Howard Bank located in Enosburg, Vermont, and the Franklin Bank located in Milton, Vermont.

Over the objections of Defense Counsel (Tr.p.200, 213 et.seq.;Tr.p.1072) the Government was permitted to introduce evidence attempting to connect the Appellants with other uncharged crimes and acts of wrongdoing as follows:

A. After offering the Shirley Brown evidence to show intent or knowledge (Tr.1069), she was permitted to testify that in August, 1972, about ten months prior to the Vermont burglaries, she was riding

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in an auto with Monks in western New Jersey and there began a conversation with Monks in which he indicated a scheme to "burglarize" a particular bank in West Milford, New Jersey, (Appendix p. 40, Tr.p.1071,et.seq.).

No evidence was ever offered or introduced that Monks or Campanile or anyone else ever did any overt act towards such a burglary; and the few details testified to included elements such as hiding three days in the woods behind the bank and wearing Shirley Brown's blonde wig. (App. 41, Tr.p.1073).

B. The Government was permitted to include in its opening statement (Tr.p.26 et.seq.) and to introduce evidence showing that both Monks and Campanile had had a couple of beers during the evening of May 30-31 at the Enosburg, Vermont, American Legion Post (Tr.p.192) and that subsequently at some time between May 30, 1973, at midnight and May 31, 1973, before 2:00 p.m. (Tr.p.208) that American Legion Post was burglarized by prying open a window with a pry bar or large screw driver (Tr.p.209-210, 212) and a quantity of cigarettes (Tr.210,211) and a quantity of cash including approximately 75 one dollar bills was taken (Tr.p.206).

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The only evidence introduced attempting to link the American Legion crime to the bank burglaries on trial was that the "prying method" of gaining entry was used at the Legion and the banks (Tr.p.345-347, p.385-386) and that paint marks left in the Legion prying were similar to those left at the banks (Tr. p.350,p.400).

The Court permitted the Government to go even further and introduce evidence that a few days to a week prior to the alleged panel van theft in May, 1973, in New Jersey, one of the van door locks turned up missing (Tr.p.987) and that when Appellant Monks' auto was searched after his arrest on June 28, 1973, a tool known apparently as a slaphammer which is used in auto body repair and also is capable of removing auto door locks was seized (Tr.p.1003-1010). Even this tool was admitted into evidence (Tr.p.1010).

However, the Government was permitted to go further in its evidence of the American Legion crime to show that Appellants had paid two Vermonters to drive them to New Jersey using forty one-dollar bills as part of that payment (Tr.p.579) and that cartons

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of cigarettes with Vermont tax stamps were found in an apartment occupied by Campanile's brother and family (Tr.p.889).

The offer of the Government in introducing all this American Legion evidence was that it was part of a pattern (Tr.p.27,201)that in the words of the prosecutor "[w]hat we are essentially showing, Your Honor, is probably whoever broke into the Legion broke into the bank". (Tr.p.217).

C. The Government was permitted to show that a certain panel van was stolen in New Jersey in May, 1973, prior to the bank burglaries, and (Tr.987) abandoned by Appellants after the burglaries in St. Johnsbury, Vermont, (Tr.p.987) and further that certain cleaning equipment in the panel truck when it was stolen was recovered in August, 1973, in a common basement adjacent to an apartment in Patterson, New Jersey, occupied by Appellant Campanile's brother (Tr.pp.982,987,988,1101).

D. The Court also permitted Andrew King to testify that prior to the May 30-31, 1973, thefts from the Vermont banks, with which Appellants were

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charged, as far back as February or March, 1973, he had had dealings with Monks involving money transfers (Tr.p.1027-1028) clearly implicating Appellant in prior uncharged "hot" or illicit money exchanges.

The Trial Judge charged the jury on the American Legion and West Milford, New Jersey, crimes as follows:

> "There has been testimony introduced regarding the burglary of the American Legion Post in Enosburg Falls the night of May 30th or 31st, 1973; the night of May 30th and early morning of May 31st of 1973. The defendants are not accused of any type of crime involving the American Legion Post. However, you may consider that evidence and give it such weight as you believe it is entitled to receive in considering the specific offenses charged in the indictment, and particularly whether it was part of a common scheme or design. Nevertheless, it is not to be considered by you as evidence of the guilt or innocence of the defendants as to the offense charged, and it should be considered by you only if you find beyond a reasonable doubt that the defendants performed the particular act charged in Count I of the indictment.
>
> There was also testimony in the case concerning a possible burglary of a bank in New Jersey in 1972 involving these de-

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fendants. Evidence of alleged earlier acts of a nature similar to the offense charged may not be considered for any purpose whatever, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt a defendant did the particular act charged in the particular count of the indictment then under deliberation, which in this instance is Count I."

TRIAL COURT ERRED REPEATEDLY IN ADMITTING EVIDENCE OF OTHER CRIMES OR WRONGDOING AND IN ITS CHARGE ON SUCH EVIDENCE

In its substantial struggle to make a case against Appellants based upon bits and pieces of evidence, mainly circumstantial, the Government offered evidence of a number of uncharged other crimes and misconduct, and also talk about the possibility of such other crimes or misconduct; the Government was permitted over objection to introduce such evidence in full detail.

There is some suggestion in the cases that a protection against evidence of other uncharged crimes may be an incident of the Sixth Amendment right to fair trial, see Spencer v. Texas (1967) 385 U.S.554,17 L.ed.2d.606,612; U. S. v. Woods

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(9/11/73) 13 Cr.L.1099, but the cases have thus far considered this question of admissability by applying a rule of evidence which is complex and varying from jurisdiction to jurisdiction, see Spencer v. Texas, supra. p.612.

In United States v. Knohl, 379 F.2d.427, 438 (2nd.Cir.1967), the Second Circuit approved the majority rule as set forth in Spencer v. Texas, supra. at p.612 as follows:

> "The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, an element in the crime, identity, malice, motive, a system of criminal activity, or when the defendant has raised the issue of his character, or when the defendant has testified and the State seeks to impeach his credibility." [citations omitted].

However, in more recent cases and despite repeated citation of Knohl, this so-called "pigeonholing" rule has been rejected and the rule appears now to be articulated by a line of decisions including United States v. Brettholz, 485 F.2d.483 (2nd.Cir.1973);

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United States v. Bradwell, 388 F.2d.619 (2nd.Cir.1968); United States v. Bozza, 365 F.2d.206 (2nd.Cir.1966), as follows:

> "the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to over-mastering hostility.....Evidence of similar acts by a defendant is admissible to prove his knowledge, intent, or design if knowledge, intent, or design 'is placed in issue in the case at trial, either by the nature of the facts sought to be established by the defense.' United States v. DeCicco,435 F.2d.478,483 (2nd.Cir.1970)." Brettholz, supra.p.487,488 quoting with approval McCormick, Evidence Sect.190 at 453 and United States v. DeCicco, 435 F.2d.478,483 (2nd.Cir.1970).

To apply the above rule, the trial court must test the offer as follows:

First, is the evidence substantially relevant to some legitimate purpose on trial, or, regardless of the stated reasons for the offer, is it actually offered to show criminal character or disposition, Brettholz,

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supra.p.487; United States v. DeCicco, 435 F.2d. 478,483 (2nd.Cir.1970); see also, Rule 404(b) Federal Rules of Evidence (effective July 1, 1975); if the offered evidence cannot meet this test of substantial relevance then it must be excluded.

Second, if the offered evidence meets the test of substantial relevance, it must pass the actual need-balancing test set out above, see Brettholz, supra.p.487; Bradwell, supra.p.622; only so much of the evidence of other crimes as meets the tests is admissible, so that each substantial detail offered to prove such other crime should be subjected to the test, United States v. Byrd, 352 F.2d.570 (2nd.Cir.); see also United States v. Ostrowsky, 501 F.2d.318 (7th.Cir.1974).

The first question then which faced the trial court in the instant case is what are the issues on trial. The Appellants were charged with two counts of theft from federally insured banks without the use of force, violations of 18 U.S.C.2113(b), and two counts of aiding and abetting the same offenses, violations of 18 U.S.C.2.

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In any prosecution under 18 U.S.C.2113(b), the issues are as follows:

1. Was money or property exceeding the value of $100 removed from a bank or credit union?

2. Was this removal an intentional stealing or purloining?

3. Did the accused commit this stealing or purloining?

4. Was the bank or credit union federally insured?

In open court with the jury present, Appellant Monks made several important stipulations relating to the above issues and thereby removed all real necessity of proof by the Government. These stipulations are set out in full in Appendix p.43, and Transcript p.23, 31, and essentially admit that on or about May 30 an amount in excess of $100 was intentionally stolen from each of the two banks in question, the Howard Bank branch in Enosburg, Vermont, and the Franklin Bank branch in Milton, Vermont, this intentional stealing having been accomplished by persons unknown; further, it was stipulated that the Franklin Bank was federally

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insured.

In light of these stipulations, the trial court had the obligation to apply the above tests to any evidence of other uncharged crimes or wrongdoing in light of the remaining issues, namely:

A. Did the defendant or defendants commit the stealing or purloining which admittedly was intentionally carried out at the times and places alleged;

(The remaining issue of whether the Howard Bank was federally insured is here omitted because none of the other crimes evidence was offered on this issue.)

A. THE SHIRLEY BROWN EVIDENCE WAS OFFERED TO PROVE CRIMINAL CHARACTER AND CRIMINAL DISPOSITION

The Shirley Brown evidence does not meet the first test. Despite the offer of the Government that it would prove intent or knowledge (Tr.p.1069). this evidence (see App.p.39/; Tr.p.1071 et.seq.) of conversations with Appellant Monks viewed in the

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light most favorable to the Government, dealt with a contemplated wrongful act, which so far as the evidence shows, never was committed by the Appellant or anyone else; the conversations occurred some ten months or more prior to the May 30, 1973, Vermont bank thefts; and involved a West Milford, New Jersey, bank (App.p. 39) far removed geographically from the Vermont banks which are within a few miles of the Canadian border (Tr. p.91-92).

In addition, if the conversations are to be taken seriously, it is clear that a crime such as the Vermont bank thefts was not contemplated; who would wear an old man's old clothes (App.p. 41) and a young woman's blonde wig (App.p. 41) to burglarize a bank in the hours between midnight and dawn? Or for that matter, at any time? Who would attempt to hide for three days in the woods behind a burglarized bank (App.p. 41)?

Certainly, these elements which form the sole substance of "plan" according to Shirley Brown, bear no relationship or similarity to the Vermont bank thefts.

It is submitted that this evidence was

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offered to show Appellant Monks to have a criminal propensity, and a criminal character, and, therefore, persuade the jury that he would act in conformity with his propensities and character; this evidence should have been excluded and it was error to admit it, United States v. DeCicco, 435 F.2d.478 (2nd.Cir.1970) and United States v. Byrd, 352 F.2d.570 (2nd.Cir.1965).

B. THE SHIRLEY BROWN EVIDENCE CANNOT PASS THE BALANCING TEST AND WAS ERRONEOUSLY ADMITTED

Should the Court find that, in fact, the Shirley Brown evidence does meet the threshold test of relevance and was not offered to show criminal character and criminal disposition, still this evidence cannot make down weight against the substantial tendency to prejudice or divert a Vermont jury.

Clearly, the Brown evidence does not even purport to show that a crime was committed, or that the Appellant committed a crime; close relationships of time and geography are totally absent; the only

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probative weight provided is by the fact that the New Jersey and Vermont facilities are all banks, and that Appellant Monks spoke of surveillance in both situations (Tr.p.193-194 and p.1073).

What need did the Government have for this evidence in light of the sole pertinent issue of whether the Appellants committed the crimes which, Appellants admitted and stipulated, had occurred? In light of the eye witnesses and the Monks finger print evidence stipulated and admitted (Tr.p.390), which placed both Appellants in Enosburg, Vermont, on the night in question, see Witness Beaulieau (Tr.p.189; and the police eye witness who placed both the vehicle and Appellant Campanile in Essex, Vermont, at 4:30 a.m. (Tr.p.447), and the eye witnesses who placed both Appellants in St. Johnsbury, Vermont, the next morning, see Walbridge (Tr.p.512-515) and Priest (Tr.p.571, 578), taken together with the coin evidence, including the wrapped coins seized in Appellant Monks' possession when he was arrested (Tr. p.899 et.seq.), the wrapped coins seized in the search of Monks' auto (Tr.p.991 et.seq.) and the coin wrapper

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evidence including the wrappers seized in the search of Monks' apartment (Tr.p.904-905) and the wrappers seized from the trash barrels behind the apartment of Campanile's brother (Tr.p.890), and the eivdence of Andrew King who claimed he brokered a sale of wrapped coins from Monks to Pasquale Borrelli in early June (Tr.p.1020-28), see also evidence of Borrelli(Tr. p.1063-65); it is submitted that there wasno necessity whatsoever for this Shirley Brown evidence on the issue of whether or not Appellants committed the Vermont thefts.

Not only was there no need, but the evidence was remote, had little or no probative value on the issue, and the prejudicial and diverting tendency of this evidence makes clear down weight in the balancing test.

C. THE AMERICAN LEGION BURGLARY EVIDENCE DID NOT MEET THE NEED TEST AND SHOULD HAVE BEEN EXCLUDED

The Government clearly had need for evidence to show that Appellants were present in Enosburg, Vermont, and Milton, Vermont, on the night in question, and that Appellants were the persons who com-

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mitted the crimes which Appellants admitted had occurred in the banks in those towns on that night. However, the need to use the American Legion burglary evidence for this or any other legitimate purpose was very weak and was overbalanced by the strong tendency of this evidence to divert and prejudice the jury, United States v. Brettholz, supra.

The Government could and did place the Appellants in Enosburg on the night in question through a series of eye witnesses including Andre Beaulieau, the American Legion steward (Tr.p.189), and Cassidy (Tr.p.131), and also by Monks' stipulation to his beer bottle finger print (Tr.p.390). In addition, by way of corroboration, the Government had the admissions of Appellant Campanile (Tr.p.769).

Further, the Government had the Essex police officer eye witness to presence of the van and Campanile southeast of the Milton bank after that break-in (Tr.p.454) and finally the whole wealth of St. Johnsbury evidence through witnesses Priest,(Tr.p.571,577-78) Walbridge and others (Tr.p.483,485).

On the issue of the theft, the Government

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had all the coin and coin wrapper evidence, supra.

With all of the above, it would appear that there was little need for the American Legion burglary evidence on the issues on trial; however, the Government insisted on using the American Legion burglary evidence, offering it under the common plan or scheme theory (Tr.p.201) and the evidence was admitted on that ground (App.p. Tr.p.1336).

The only evidence of commonality involved was the prying method of entering evidence (Tr.p.345-47, 350,385-86, 400). It was the theory of the Government that Appellants were two New Jersey men who came to rural Vermont to steal from banks and, in fact, broke into and stole from two Vermont banks. The American Legion is not a bank; and so far as the evidene showed, the Appellants were unaware of the existence of the Legion until discovering it by chance (Tr.p.142); a significant portion of the proceeds of the American Legion burglary was not money, but cigarettes (Tr.p.210,211).

The Court permitted the Government to divert the jury from the issue on trial, by allowing the Government to spend considerable time struggling to

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prove that the Appellants committed that uncharged crime, dealing with evidence having no probative weight whatever on the Vermont bank theft issue.

In this regard, the Government showed that in St. Johnsbury, Appellant Monks said "don't worry about cigarettes, I have plenty", (Tr.p.692) and again that cigarette cartons with Vermont tax stamps were seized in Appellant Campanile's brother's apartment (Tr.p.887-88).

In addition, the Government had a theory that some of the seventy-five one dollar bills, taken at the American Legion (Tr.p.206) were used to pay the Vermonters who drove the Appellants from St. Johnsbury to Patterson, New Jersey (Tr.p.578-579). If probative at all, this evidence went to the issue of who committed the American Legion break-in,but had no relevance or probative weight on the Vermont bank thefts.

It is submitted that the evidence of the uncharged crime at the American Legion including the evidence regarding the one dollar bills and the cigarettes had no probative weight on the issue on trial, and was clearly out weighed by the prejudice

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and diverting effect which this evidence had upon the jury.

D. THE EVIDENCE ATTEMPTING TO PROVE THE VAN TRUCK THEFT DID NOT MEET THE NEED TEST AND SHOULD HAVE BEEN EXCLUDED

The Government was able to place the van truck, which it claimed Appellants used in the bank thefts, in the possession of Appellants in Enosburg, on the night of those thefts [see evidence of Converse, (Tr.p.79); Cassidy (Tr.p.114); Lassen (Tr.p.305)]; and in Essex, southeast of Milton after the theft at the bank in Milton [see evidence of Patrolman Snelling (Tr.p.447 et.seq.)] and again through the St. Johnsbury testimony (Tr.p.480-482).

In addition, Appellant Campanile's confession was introduced that he had, in fact, stolen the van truck in New Jersey and driven it to Enosburg and St. Johnsbury at the crucial times in question (Tr. p.969 et.seq.). Remember, that the issue was whether the Appellants committed two Vermont bank thefts and, given the above evidence, there was no legitimate need whatever to introduce the evidence of this uncharged auto theft through witnesses Sesto (Tr.p.980) and

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Altieri (Tr.986); or to speculate on the details of how the truck may have been stolen; however, the Court permitted such prejudicial and diverting speculation by permitting the evidence that three days before the van truck was stolen by Campanile, one of the door locks disappeared and the owners did not replace it (Tr.p.987); even further, a tool called a slaphammer was seized in a search of Appellant Monks' auto on June 28, almost a month after the Vermont bank theft, and this tool was admitted into evidence (Tr.p.1010) on the theory that one of its uses can be to remove auto locks.

The theft of this van truck was admitted by Appellant Campanile (Tr.p.769) and all of this evidence, in addition to having no probative weight on the issue, was cumulative, United States v. Byrd, 352 F.2d.570 (2nd.Cir.1965); and it was extremely prejudicial and diverting to the jury.

E. THE EVIDENCE TO PROVE THE CLEANING EQUIPMENT THEFT DID NOT SATISFY EITHER TEST AND WAS ERRONEOUSLY ADMITTED

The Court permitted evidence in detail of commercial cleaning equipment allegedly stolen with

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the van truck (Tr.p.983-85) pictures of this equipment were admitted (Tr.p.984), witnesses Sesto and Altieri described this equipment in detail (Tr.p.982-84 p.988-89) and Mr. Altieri further testified to the recovery of this equipment in the common basement near Campanile's brother's apartment (Tr.p.988).

The theft of this equipment is no doubt a crime under New Jersey law; however, the fact that Appellants were or were not involved in that crime has no probative weight whatever, no relevance whatever to the issue of the Vermont bank thefts; there is no commonality, no indication whatever of probity on any of the issues set forth in Brettholz, supra., of intent or knowledge, or design or motive; this crime was completely committed hundreds of miles from Vermont, in a manner totally unrelated to any bank break-in.

The only purpose for this evidence is to show criminal character or disposition, see United States v. Bozza, 365 F.2d.206 (2nd.Cir.1966) and this evidence should have been excluded.

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F. THE PRIOR COIN DEAL TESTIMONY OF KING WAS CRIMINAL CHARACTER OR DISPOSITION EVIDENCE

The Court permitted Andrew King to testify over objection that in February or March, 1973, months prior to the Vermont bank thefts, he had coin transactions with Appellant Monks, inferentially of the same discounted type as the sale of coins to Borrelli, about which King also testified (Tr.p.1027-1028).

Such evidence had no purpose other than to show criminal character or disposition. Arguably, the Government had need of the King-Borrelli transaction on the theory that it was relevant to show that Monks was in possession of wrapped coins after wrapped coins were stolen from the Vermont banks, and further that Monks was, for some reason, willing to sell these coins at a discount. However, the fact that Monks may have engaged in such a money transaction prior to the Vermont bank thefts is totally irrelevant to the issue, has no probative value whatever, and was only another piece of criminal character and disposition evidence that was erroneously permitted against Appellant.

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CONCLUSION

In the prosecution of William Monks for thefts in excess of $100 from two Vermont banks on the night of May 30, 1973, the Government had only to prove that Monks was the person who committed these crimes, because the facts that intentional thefts from the two banks in question, of more than $100, on the night of May 30, 1973, were admitted and further it was admitted by Appellant Campanile that he had stolen the van truck in question and driven to Vermont on May 30.

The Court erred repeatedly in permitting the Government to get over what might otherwise have been a shortfall in its proof, by showing that Appellant Monks had a criminal character and criminal disposition; such evidence included the Shirley Brown evidence of the conversations regarding West Milford, New Jersey, bank, the American Legion break-in evidence, the truck theft evidence, and the coin transfer evidence.

Taken separately and together, this evi-

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dence had to prejudice and divert the jury in its proper consideration of the issue on trial.

In addition, if some of this evidence did have some purpose other than to show criminal character or disposition, such evidence did not and could not make down weight against its tendency to prejudice and divert.

For the above reasons, it is respectfully urged that the convictions of William Monks be reversed.

DATED at Burlington, Vermont, this 27th day of January, 1975.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Richard C. Blum, hereby certify that on this 27th day of January, 1975, I served a copy of the enclosed Brief of Appellant Monks and a copy of the Appendix of Appellants in the matter of United States of America vs. Anthony Thomas Campanile and William Monks, Docket Nos. 74-2160 and 74-2320, upon The Honorable Jerome F. O'Neill, Assistant United States Attorney, at his last known office address at the Federal Building, Rutland, Vermont 05701, first class postage prepaid.

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